CORPORATION COURT FOR THE CITY OF BUENA VISTA.

May 5, 1922.

C. W. CATLETT, *Plaintiff v.* PHILLIPS & RUFF, *Defendants,* NATIONAL CASH REGISTER CO., *Petitioner.*

Conditional Sales—Docketing—Construction of Statutes—Constitutionality.—Va. Acts 1920, p. 398, purporting to amend and re-enact § 5189 of the Code of 1919, requiring the recordation of conditional sales agreements, construed and held unconstitutional for lack of enacting clause. Acts 1919, p. 40 amending § 5189 also construed.

OPINION.

RO. L. GARDNER, Judge: On October 18, 1921, Catlett sued out an attachment against the said Phillips upon the sole ground that he was converting his property with intent to hinder, delay and defraud his creditors and had the same levied on the property of Phillips & Ruff—including a cash register which the Register people had sold to defendants, and upon which there was an unpaid balance evidenced by the recordation of a conditional sale contract securing that balance. The National Cash Register Co. filed its petition in the attachment proceedings claiming this register, "by virtue of a reservation of title in a conditional sale which had been duly docketed in the clerk's office of the corporation court of the city of Buena Vista."

Replying to this petition, Catlett contends that the docketing of the conditional sale is invalid, because it was not docketed in five days after delivery of the register to the purchasers as required by the act of assembly of 1920, p. 398; and generally, that the said conditional sale was not docketed as prescribed by statute, and should be postponed to the lien of his attachment.

The Cash Register Co. alleges that:

(1) "The act does not require docketing in five days, but on the contrary the docketing at any time is good as against subsequent lienors, and permits docketing within five days after delivery of the goods to the vendee and if so docketed shall be valid against lien creditors whose liens have accrued during the five days; thus granting five days' grace in which to docket."

(2) "The act of 1920 is unconstitutional and void, because it has no enacting clause."

(3) And further moves to quash the attachment and charges that the same was sued out upon insufficient grounds.

The contract, or writing, is dated July 1, 1921, and was docketed by the clerk the 25th day of July, 1921. It is conceded, at bar, that the writing was not filed with the clerk within five days from the delivery of the register to the purchasers.

Virginia's law makers have been wrestling with the matters of what character of written contract constitutes a conditional sale, and what sort of entry constitutes effectual notice to creditors, (and *bona fide* purchasers), of such sale and the conditions thereof, for nigh on to half a century;—even as good old Moses wrestled with the burning bush, (that was not consumed), by-the-way-side on Mt. Horeb.

The importance thereof; the great store set thereupon; and the manner of providing a substantial, mercantile statutory lien, and an economical, brief, and sufficient *modus operandi* of "spreading upon record" such lien may best be told in a painstaking, studious examination and comparison of the variant conditional sales legislation that has engrossed about every assembly since the Virginia Code of 1869—Acts 1883-4, pp. 27-235; all which has culminated in the sessions act of 1922, p. 60, that is apparently perfect, or substantially so.

Omitting the caption, or title,—which is no part of an act, *vide* Constitution Section 52—and reproducing here that portion of the act of 1920, pertaining to creditors solely, this act says:

"APPROVED MARCH 19TH, 1920."

"5189. Every sale, or contract for the sale of goods and chattels, wherein the title thereto, or a lien thereon, is reserved, until the same be paid for, in whole or in part, or the transfer of the title is made to depend on any condition, where possession is delivered to the vendee, shall, in respect to such reservation and condition, be void as to creditors, unless such sale or contract be evidenced by writing, signed by the vendor and the vendee, setting forth the date thereof, the amount due, when and how payable, a brief description of the goods and chattels and the terms of reservation or condition; and until and except from the time a memorandum of said writing, setting forth the name of the vendor and vendee, the date thereof, the amount due thereon, when and how payable, and a brief description of said goods and chattels is within five days after the delivery of the goods to the vendee, filed for docketing with the clerk of the circuit or corporation court of the county or corporation where deeds are admitted to record, as provided by law, in which said goods and chattels may be."

"It shall be the duty of the clerk to docket the writing mentioned herein for which service he may charge a fee of twenty-five cents—but no tax shall be charged thereon."

All acts and parts of acts in conflict with the act are repealed; and it has an emergency clause making it effective from its passage.

In express terms this act requires that, "within five days after the delivery of the goods to the vendee, a memorandum of the

said writing shall be filed for docketing with the clerk," and that he shall docket the same as directed. This is jurisdictional, in effect; and is analogous to the return of a notice of suit to the clerk's office within five days after service of the same. Virginia Code 1919, § 6046. If not so returned and filed the clerk has no authority to mark it filed, or docket it. Swift & Co. *v.* Wood, 103 Va. 495. So, if the memorandum of agreement be not filed with the clerk within the five-day period the clerk is without jurisdiction to docket it; or, rather exceeds his jurisdiction in so doing. That right is lost forever.

This view is abundantly supported in that the law makers have themselves, just amended and re-enacted this statute of 1920, in the particular here considered, by their act approved February 18th, 1922, p. 60, so as to give the vendor a lien, or his right, from the time of filing the writing with the clerk, and with this further grant of grace; "provided, that if such filing for docketing be done within five days from the delivery of the goods to the vendee, it shall be as valid as to creditors as if such filing had been done on the day of the delivery of the goods and chattels." Evidently, this is what the legislature was driving at, endeavoring to do, in the act of 1920. They did not.

Approaching the next question raised under the pleadings, in all solemnity and a touch of temerity—upon like principle the supposed act of 1920 is unconstitutional. 'Tis but a truism to say so;—for the sufficient reason that there has been no 'publication' in compliance with section 52 of the constitution of Virginia requiring that, "the section amended shall be re-enacted and published at length." Beale *v.* Pankey, 107 Va. p. 215; State *v.* Patterson, 4th S. E. p. 352. Such requirement is mandatory, unquestionably: and in no sense directory as urged in the argument, citing Cape Gireadeau *v.* Reily, 52 Mo. p. 424; Postal Tel. Co. *v.* State, 110 Md. p. 608. Nowhere does the act of 1920 pretend to re-enact section 5189 of the Code. Nowhere is the mind and will of the law makers imprinted upon this act—a loose and careless document with no enacting clause whatever.

Insofar as appears from the face of this act it emanates from the governor, the president of the senate, and the speaker of the house, and its keeper of the rolls: mere governmental agencies to approve, subscribe and certify the legislative will;—and in this regard bearing striking similitude to the act of a court clerk issuing a writ and omitting the "running clause". Section 106 of the constitution prescribes that, "Writs shall run in the name of the 'Commonwealth of Virginia' and be attested by the clerks of the several courts." Accordingly, if the clerk issue a writ that fails to run in the name of the Commonwealth of Virginia, such writ is in direct violation of the constitutional mandate and

is, *ipso facto* void. It is no writ at all. Purely the personal act of the clerk. His is the responsibility.

Verily, the constitution is the organic law. *Vox populi suprema est lex*—the voice of the people is supreme, sovereign:—must be respected; must be obeyed. Back to the Constitution is a Solemn Slogan. The General Assembly—itself a creature of the constitution—cannot afford to ignore it; nor deal lightly with it, or any of its provisions. Certainly this court will not do so; nor sanction its being done, in all conscience!

In demanding re-enactment, an enacting clause, the constitution exacts of the assembly that it, in this simple, specific way, and no other, declare its will; impress its acts and doings in this precise manner, so that upon a mere perusal the same may be identified and adjudged as the act of this co-ordinate branch of the government;—thus placing responsibility where it belongs. The language is emphatic; remarkable, in that it points out a uniform usage that comes to us adown the ages.

Prefacing its utterness with a declaration of authority, as a source of identity, has been the practice of about every public assembly—in this country—since time whereof man's memory runneth not to the contrary. Patriotic Patrick Henry, in defiance of a power-crazed king essaying to act without accountability, fathered these famous words: "—but as for me; give me liberty or give me death!" There was never uncertainty, a ghost of a doubt, about responsibility for this ultimatum, this edict that startled a universe.

The Declaration of Independence; National, State and other conventions; (perchance!)—An Old Maid's Congress; city, town, county, ward and district meetings—all, all breathe some declaration of authority, identity, responsibility.

"We, therefore, the people of Virginia, so assembled in convention through our representatives, with gratitude to God for past favors and invoking His blessings upon the result of our deliberations, do ordain and establish the following revised and amended Constitution for the government of the Commonwealth—"

Thus is the genesis of Virginia's present Constitution; embodying also, affection to salutation and supplication to the Almighty for domestic tranquility, following a prologue of whereases and pertinent, formulated facts.

The prerequisites are as long ago as The Virginia House of Burgesses; as old as parliamentary procedure; as ancient as the edicts of kings, queens and other potentates. In fact, to speak in earnest, antedate all these.

The Beginning of mortal existence, in apt terms, accords that existence to the Supreme Being, maker of heaven and earth! The God of Heaven in sending down from Sinai His Command-

ments, avouches this plenary proof of authenticity: "And God spake all these words, saying—" (Exodus XX). Doctor Luke, the lawyer, physician, evangelist and wondrous scribe, diagnoses and amplifies this way: "It seemed good to me also, having had perfect understanding of all these things from the very first to write unto thee most excellent Theophilus—"

And whether edicts, or laws, be formulated by a Supreme Ruler, petty, or a sovereign people they uniformly begin with fixed forms denoting source, power, authority, responsibility.

This relegates us to the act of 1919, pertaining to a sufficient docketing. Shortly anterior to the Code of 1919—Acts 1904, p. 96 *et seq.*: National Cash Register Co. *v.* Burrows, 110 Va. pp. 785-791—the cheap, simple mode of docketing from the original writing was deemed and declared sufficient: and that without acknowledgment, or a witness. The Code of 1919, however—section 5189—requires that the writing be "duly admitted to record" and that it be acknowledged or attested by a subscribing witness "as to both the vendor and the vendee." The statute of 1919, p. 40, amending section 5189 of the code, authorizes the docketing of "a memorandum of the writing", at the same time strictly requires that: "Such writing shall be acknowledged or attested by a subscribing witness as to both the vendor and vendee." This too, is jurisdictional, *pur et simple.* Clearly the clerk is not authorized to docket the writing in such case, has not the right to docket or file it, if not acknowledged or so witnessed.

If this conditional sale, the writing relied upon, is neither acknowledged nor witnessed, it is not, in law, docketed: and is therefore, not constructive notice. It is not before me, and appears to have been mislaid or is in possession of the vendor. Time is accordingly, given petitioner until the next term of court in which to produce the original writing, which speaks for itself.

As to the validity of the attachment; no evidence is before me. Time will be given the plaintiff in which to establish, before a jury if he choose, that defendant Phillips was converting his property with intent to hinder, delay and defraud his creditors.